

## Preface

“**R**estitution” is a word that bears a number of meanings in American law. This book is about restitution in its core sense: the common-law action that a plaintiff brings to recover a defendant’s unjust enrichment. Sometimes a plaintiff uses restitution law to make a defendant pay for benefits he has received; sometimes restitution is used to make a defendant return specific property to which the plaintiff has a claim of ownership. Either way, restitution is the body of law concerned with taking away what a defendant has wrongfully obtained (or, in any event, should not be permitted to keep), not with rectifying an injury the plaintiff has suffered. As this brief statement suggests, restitution is not just a remedy, though it is sometimes misunderstood that way. It is a type of legal claim—a cause of action, and an important one. This book explains its workings and rationales. (“Restitution” is also sometimes used to refer to payments that criminals make to compensate their victims. This book is not about restitution in that sense of the word.)

The reader familiar with private law will recognize that restitution in the sense used here is in many ways symmetrical to the law of torts. Tort law governs liability for losses that one person inflicts on another. Restitution governs liability for gains that one person makes at another’s expense. Tort and restitution law sometimes cover the same situations, with the choice between them just a matter of which amount is larger (and thus which the plaintiff prefers to recover): the plaintiff’s losses or the defendant’s gains. But restitution also offers a more powerful range of equitable remedies than are traditionally available at the end of a tort case, and it covers many situations that neither tort nor any other body of law does. Restitution thus is a major division of American private law, one that sits alongside the law of tort and contract and provides a practical and theoretical complement to them.

Restitution has been much neglected by the American legal academy, however, and has in turn become a subject of faint familiarity to much of the bench and bar. If Professor Kull overstated the matter, it was not by much: “American lawyers today (judges and law professors included) do not know what restitution is. The subject is no longer taught in law schools, and the lawyer who lacks an introduction to its basic principles is unlikely to recognize them in practice.”<sup>1</sup> This ignorance is a misfortune for the academic; the law of restitution is full of interesting problems and responses to them, and an understanding of the subject is essential to a clear overall grasp of the law of private obligations. A sophisticated mastery of contract law is particularly impossible without a sense of the principles of restitution that surround it. The ignorance is equally unfortunate for the practitioner because the law of restitution provides a highly useful set of tools for analyzing a wide range of cases that are handled less effectively, or not at all, by other bodies of law. A lawyer struggling to fix a problem by use of a familiar but inferior legal method may have no reason to suspect that restitution provides a better way—that a wrench is available, and would work better than the pliers on hand.

Restitution has suffered such neglect in part because it has a reputation as a hodgepodge of leftover doctrines that don’t add up to a clear body of knowledge. That reputation has partly been perpetuated, I believe, by the absence of a readable book that explains the topic in one place and shows how its components relate to one another. This book aims to fill that void. The American Law Institute’s publication in 2011 of the *Restatement (Third) of Restitution and Unjust Enrichment* is a suitable occasion for a treatment of this kind. Kull’s work on that project has been heroic and immensely valuable; the new *Restatement* explains and organizes its subject in a highly comprehensive and convincing manner. At well over five hundred thousand words, however, it serves better as a reference than as a source of instruction. (The same could be said of the only American treatise on the subject, by George Palmer.<sup>2</sup> It is even longer than the *Restatement*.) This book seeks to explain the law of restitution in as concise and lively a manner as the subject will permit, with a somewhat different organization than the *Restatement* and with more attention to the theory behind the rules. Some details are skipped or handled lightly—the inevitable price of a short treatment. But the aforementioned sources can provide additional discussion for readers who are left wanting more.

This book starts with a brief essay on the relationship between restitution and other bodies of law, then proceeds to consider, in a chapter

apiece, four major families of liability in restitution (mistakes, conferrings, takings, and failed contracts), the two kinds of remedies available at the end of a case (legal and equitable), and defenses. The aim is to show that restitution law has a moderately coherent structure, that it lends itself to explanation by reference to a fairly clear and compact set of principles, and that it is interesting. If the book fails in any or all of those ambitions, I will settle for at least providing a helpful overview of a significant and underappreciated branch of the law that can be read in a few sittings.

A final note at my copyeditor's request: I sought to write this book in the clearest possible English. I naturally encountered the problem of choosing a pronoun to refer to someone who could be male or female. I dealt with this by treating the masculine pronoun as referring to anyone of either sex; I find the other, newer ways of handling the problem too self-conscious to bear. I know others have different views, and am sorry for the annoyance that my inclusive use of "he" and "him" may cause them.

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